JD–94-05
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TEAMSTERS LOCAL 705 AFFILIATED
W/ IBT,[1]

and Case No. 13-CB-18123-1

PICKENS-KANE MOVING & STORAGE CO.

Vivian Perez Robles, Esq.
of Chicago, Illinois, for the General Counsel.
Marilyn Brassil, Esq.
of Chicago, Illinois, for the Respondent.
Thomas F. Dugard, Esq.,
of Chicago, Illinois, for the Charging Party.

DECISION

Statement of the Case

David I. Goldman, Administrative Law Judge. This case was tried in Chicago, Illinois on October 17, and 18, 2005. The charge was filed by Pickens-Kane Moving & Storage Co. ("Pickens-Kane" or "Employer") May 25, 2005, alleging violations of the National Labor Relations Act (the "Act") by Teamsters Local 705 Affiliated with IBT ("Local 705" or "Union"). The General Counsel issued a complaint on June 29, 2005 alleging that Local 705 violated Section 8(b)(1)(A) and (2) of the Act. Local 705 filed a timely answer denying violations of the Act.

Based on the entire record, [2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the counsel for the General Counsel, the Respondent, and the Charging Party, I make the following findings of fact, conclusions of law, and recommendations.

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[1]The caption and name of the Respondent in this case have been amended to reflect the disaffiliation of the Teamsters from the AFL-CIO effective July 25, 2005.

[2]Counsel for the General Counsel's unopposed Motion to Correct the Transcript is granted as to numbered paragraphs 1-3. The motion is denied as to numbered paragraph 4, although the transcript is amended at page 165, line 4, to read "He said about half of –-".

I. Jurisdiction

The complaint alleges, Respondent admits, and I conclude that Respondent is a labor organization within the meaning of Section 2(5) of the Act. Charging Party Pickens-Kane is a corporation that provides moving and storage services for customers from its various offices in Chicago, Illinois, where it annually purchases and receives at its facility goods valued in excess of $50,000 directly from points outside the State of Illinois. The complaint alleges, Respondent admits, and I find that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

This case arises from two incidents occurring on successive Fridays in May, 2005.[3] In each instance, the General Counsel alleges that Union agents attempted to cause and caused the Employer to remove and/or lay off certain employees from a moving job that the Employer had contracted to perform. The General Counsel alleges that the Union's actions were in violation of section 8(b)(1)(A) and (2) of the Act.

III. Factual Findings

Pickens-Kane operates a moving and storage business in the Chicago area. It maintains three facilities, one of which employs union-represented movers. Local 705 represents numerous bargaining units of moving employees in the Chicago area, including a bargaining unit of Pickens-Kane employees. The terms and conditions of the Local 705-represented Pickens-Kane employees are governed by the parties' labor agreement (Jt. Exh. 1), which was effective March 16, 2000 and continues in effect to at least March 15, 2006.

The labor agreement contains a union security clause (the validity of which is not at issue) that provides, generally, that bargaining unit employees must become and remain members in good standing of the Union. The union security clause, however, contains a number of fairly typical contractual and legally-mandated conditions governing the general requirement of union membership. The Employer's compliance with the union security clause is a source of dispute between the parties. Indeed, the Union's concern over the Employer's compliance with union security prompted the incidents at issue in this case and resulted in at least one pending contractual grievance. The Employer denies violating the union security clause (U. Exh. 1).[4]

As part of their effort to police the labor agreements covering the employees, Union representatives Curtis Johnson and Richard de Vries visit buildings where moving companies are working and check the union cards of employees. The visits have a number of purposes: they provide visibility for the Union and its representatives, and make the Union representatives directly available to consult with and assist employees, but a significant purpose of the visits is to assess employers' compliance with union security provisions.

[3] All dates are in 2005 unless otherwise indicated.

[4] Union Exhibit 1 is the grievance filed by the Union just after the second of the incidents described herein. Pages 3-7 of the Exhibit were rejected but inadvertently placed in the record. General Counsel's unopposed motion to strike these pages is granted.

a. **May 13 at the Prudential Building**

On the evening of May 13, a crew of three Pickens-Kane employees (Lee Badgely, Joe Cooper, and Lenny Shipman) was beginning a move at 130 East Randolph, the site of a downtown Chicago building known as the Prudential Building. The job was being performed for People's Energy, a utility business located in the building.[5] Robert Donohue works as a Senior Operations Specialist for People's Energy and in that capacity coordinates moves in and out of the building, including this move, which involved the relocation of about 20 people and various office equipment from the 3rd to the 22nd floor. In addition to the Pickens-Kane movers there were a couple of Pickens-Kane carpenters performing work in the building that day.

Donohue testified that at approximately 6:00 p.m., one of the Pickens-Kane carpenters called him in his office on the 22nd floor and said that there was a representative of the movers Union on the loading dock who wanted to talk to someone. Donohue proceeded to the loading dock where he found Union representative Richard de Vries. Donohue testified that de Vries approached and "mentioned to me that the move should stop because Pickens-Kane was using non-Union movers." Queried on cross-examination, Donohue reiterated that de Vries "said these are non-Union movers" and "the job should stop."

Donohue responded to de Vries, essentially by agreeing with him: "I said this is a Union building, we pay for Union movers and they should be Union movers." Donohue testified that he told the Pickens-Kane carpenter who had called him down to the loading dock that "we need Union movers here, this is a Union building, so do what you have to do, call your office, have the movers call their office." At that point the move had stopped. Donohue then returned to his work station on the 22nd floor where he attempted to reach Pickens-Kane manager Tony Drapak. When Drapak called him back Donohue told him "I wanted a Union crew, the Union representative is saying these people are not Union employees so we need a Union crew out here." Donohue says that Drapak told him that Pickens-Kane was "right in what they were doing" but nonetheless acceded to Donohue's request that a new crew be sent to perform the moving work. Between 7:00 and 7:30 p.m. Donohue observed a new Pickens-Kane crew at the site. The previous crew was gone.

Drapak's testimony regarding the call from Donohue was similar. He testified that he asked Donohue why he wouldn't allow the three men to stay on the job, and Donohue "told me because they were non-union." Drapak says he first told Donohue that Pickens-Kane had a right "to work non-Union men to do overflow work" but Donohue insisted. Drapak testified that Donohue stated that "Richard de Vries was in the security office with him and told Bob Donohue that the three men were non-Union and they were not allowed to work in the building." Drapak agreed: "I told him I would replace the three, the men, he was very upset and need to get the job done right away and didn't want any problems." Drapak then called his operations manager and told him "to have the three men at People's Gas leave, have them dropped off to my job and pick up three Union men to bring back." Subsequently, Badgely and Cooper worked with Drapak for the evening, and Shipman was assigned to pick up other crews.

Union representatives Johnson and de Vries testified for the Union. Their narratives of the encounter were significantly vaguer on the details of the conversation with Donohue. According to Johnson, he and de Vries were "out that evening just riding again, checking members" and came across a Pickens-Kane truck parked next to the Prudential building. The

[5] During the hearing, witnesses sometimes referred to People's Energy as People's Gas. For purposes of this decision they are interchangeable references.

truck was not the typical Pickens-Kane truck that, according to Johnson, is gold, red and yellow, and that "you can see blocks away," but rather, a white truck with a small Pickens-Kane insignia on the side. As Johnson approached the truck to introduce himself as a new business agent, the truck drove away before Johnson reached the driver. Almost immediately thereafter the garage door to the Prudential building opened. Puzzled by the driver's reaction, de Vries and Johnson entered the garage and walked to the loading dock area where they found a building security officer. They asked if Pickens-Kane was in the building and the security guard confirmed that this was so. According to Johnson, either he or de Vries, but most likely de Vries, asked the security guard if this was a union building, "[b]ecause it seems like something is going on here."

Johnson testified that building management was called and "[a]t some point the decision was made to call the customer." According to Johnson either the security guard or building management summoned the People's Energy representative. During this period Johnson saw the Pickens-Kane truck again, and a couple of Pickens-Kane employees on the loading dock, but the employees would not speak with him.

Johnson testified that the customer, "a big-wig at People's Gas" whose name Johnson did not catch, but who was Donohue, came downstairs and "wanted to know why his move wasn't happening." Johnson explained that Donohue

> "came down and wanted to know what's the problem? Why my move is not happening. And, basically, between security and Richard [de Vries] they explained to him what was going on, that, they think that they got non-Union people in here and this is a Union building, and that's what's going on."

Johnson testified that he was not sure, but that he thought that he subsequently heard Donohue say that he was going to call Pickens-Kane.

Union representative de Vries testified similarly, but his testimony was even sparser as to the interchange between him and Donohue. De Vries described entering the garage area and asking the security guard about the building's policy on unionized trades, including movers. He then described the arrival of Donohue on the dock. De Vries did not testify as to the exchange that occurred between him and Donohue but picked up the story from the point that Donohue declared that he was calling Pickens-Kane "because he ordered a union crew over here, over at the building, he knew it was a union workplace." According to de Vries, Donohue soon left, de Vries and Johnson then left the building, and that was the end of the incident.

The varying accounts of the incident do not, in any material way, conflict but the Union representatives' accounts glide over (in the case of Johnson) or omit entirely (in the case of de Vries) the substance of the conversation between de Vries and Donohue. Thus, Johnson and de Vries admit that they approached security and expressed interest and concern about whether Pickens-Kane was on site and whether this was a union or non-union building. For reasons neither clarify, both agree that Donohue was summoned to the loading dock. Significantly, Johnson did testify that Donohue arrived wanting to "know why his move wasn't happening" and the response, according to Johnson, from de Vries and the security guard, was that "they think that they got non-Union people in here and this is a Union building, and that's what's going on." Thus, Johnson's account links the move being stopped to the presence of non-Union employees. De Vries, for his part, testified about the incident, how it began, and how it ended, but was not asked and did not testify as to what he and Donohue discussed. This is telling. I note that de Vries, as the Rule 615 representative for the Respondent, was not subject to sequestration and was present throughout all the testimony including Donohue's. Thus, he

heard Donohue testify, unequivocally, on direct and cross examination, that during their conversation de Vries told him "the job should stop" because Pickens-Kane "was using non-Union movers." Yet this testimony is not rebutted in de Vries' narrative account of events on May 13, but only—if at all—in a concluding general denial at the close of de Vries' direct examination.[6]

I credit Donohue's testimony, as set forth above. Donohue's testimony was internally consistent, and plausible from start to finish. His demeanor was that of a witness recalling the events without animus or interest, and his story appears to be a complete account of the events he experienced, which adds to his credibility. Indeed, whether borne of the desire to have the work completed without incident, or from conviction, or both, it is evident from the testimony of all parties that Donohue essentially agreed with de Vries' complaint, stating "we pay for Union movers and they should be Union movers." Thus, his testimony is not mediated through hostility that could color his account. Donohue took immediate steps to have Pickens-Kane replace the non-Union crew. Indeed, his actions make little sense in the absence of a request—implicit in the declaration that "the job should stop" because of the "non-Union movers"--by de Vries to have the non-Union employees removed. Further, Johnson and de Vries' avoidance in their testimony of the details of the conversation with Donohue—a conversation that indisputably led to Donohue 's declaration that non-Union movers needed to go--is not without significance. Both Johnson's and de Vries' testimony makes clear that a concern over the prospect of non-Union employees working in the building was the issue that brought them into the security guard area of the building and that, as Johnson admitted, this was explained to Donohue as the "problem" that was causing the move to stop. That this was indisputably the subject at hand during the discussion with Donohue adds further plausibility to the testimony of Donohue. In addition, Drapak's testimony corroborates Donohue's.[7]

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[6]After de Vries had testified as to events on May 13 and May 20 (without contradicting anything of substance in Donohue's testimony regarding the May 13 incident), counsel for Respondent concluded the direct examination of de Vries by eliciting the following:

"Q. That day on the 20th, did you ever ask that they stop the job? That the employees stop the job?

A. No. No demand was made to stop working.

Q. What about on the 13th, did you demand that the job be stopped?

A. No demand was made to stop working." (T. 157).

To the extent this testimony, which came at the end of de Vries' direct examination and was not part of his earlier testimonial narrative of events on May 13, constitutes a denial of Donohue's assertion that de Vries told him "the job should stop" because Pickens-Kane "was using non-Union movers," I do not credit it. I believe that de Vries' narrative avoided the details of the Donohue conversation for good reason. The general denial—presented almost as an afterthought—is not creditable in the face of Donohue's specific recounting of the context and conversation in which de Vries demanded that "the job should stop." See, *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001) ("it is settled that general or "blanket" denials by witnesses are insufficient to refute specific and detailed testimony advanced by the opposing sides' witnesses"), enfd. 309 F.3d 452 (7th Cir. 2002). In fact, it is unclear from the question and answer whether de Vries is testifying narrowly that he did not tell any *employees* to stop working, or alternatively, that he did not tell *anyone* (including building management) that work should stop if the non-Union movers were not replaced. The former is, by all evidence, true.

[7]I credit Drapak's undisputed testimony that Pickens-Kane acted to remove the non-Union crew in accordance with Donohue's demand, a demand Donohue and Drapak attributed to de Vries.

a. May 20, at 111 South Wacker Drive

On May 20, Pickens-Kane commenced a multi-week move of the accounting firm Deloitte into a newly reconstructed commercial office building at 111 South Wacker Drive. Deloitte was to occupy half of the 51-story office building and upon completion of the move 3,000 Deloitte employees would be working in the building.[8]

Late afternoon on May 20, de Vries and Johnson pulled up in the alleyway outside the building's dock and spoke with a group of movers standing outside. A Pickens-Kane truck was parked nearby. De Vries and Johnson entered the dock area. De Vries had been to this building dock seven or eight times in the previous two weeks and was familiar to the security personnel. He introduced Johnson to the security personnel and when two employees wearing Pickens-Kane shirts emerged onto the dock Johnson approached them. Johnson introduced himself, asked them to write down their names, and asked to see their union cards. The employees identified themselves as (Roland) Garcia and (Richard) Rodriguez, and showed union cards indicating they were members of a local union other than Local 705. Johnson then returned to where de Vries was standing and showed him the names of the two employees and indicated that they were members of a different local union.

A few minutes later, Pickens-Kane account manager Joseph Bekken, who was serving as a Project Manager for the move, came onto the dock area and aggressively confronted de Vries until the security guard intervened and told Bekken to back off. Bekken then moved to the other end of the dock area.

At that point the building manager for the 111 S. Wacker property, Phil Domenico, came onto the dock. Domenico asked de Vries what he was doing and de Vries indicated he was there to card some people. Domenico walked back and forth between de Vries and Bekken asking questions and trying to resolve the conflict. De Vries stated that Domenico said, "basically, isn't this something that can be resolved by doing a grievance." De Vries said, "possibly."[9] Domenico said he would rather that it be done that way. Domenico acknowledged that de Vries had a right to talk to the Local's members, but asked de Vries not to do so in the dock area and asked him to move outside the dock area to the edge of the premises. De Vries and Johnson left the dock and went outside to the alley on the edge of the premises as requested. De Vries and Johnson stood around for 15-20 minutes and were preparing to leave when Michael Duffee arrived.

Duffee is a partner in a law firm that has represented Pickens-Kane in labor matters since the mid-1990s. On May 20, Duffee received a call on his cell phone at about 4:00 p.m. from Pickens-Kane manager Drapak. Drapak told Duffee that "I've gotten a call that Richard de

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[8]The move was a significant one, and an achievement for Pickens-Kane. According to Union representative de Vries, "[t]he Deloitte move job was one of the prizes of the moving season. All reputable movers were submitting bids. . . . Every single mover in the industry was trying to get their piece in it. " When Pickens-Kane was approved as the move contractor the Union's steward called de Vries to tell him the news that "we got the bid."

[9]The record is not explicit, but I infer, and think it obvious, that the issue here was Garcia and Rodriguez's nonmember status. The discussion followed Johnson telling de Vries that the employees were nonmembers, and a grievance was filed by Johnson on Monday, May 23, alleging that Pickens-Kane was violating the union security clause of the contract (U. Exh. 1).

Vries is over at one of our moves at 111 South Wacker, can you get over there for me right away?"[10]

Duffee hailed a cab and arrived at 111 South Wacker at about 4:30 p.m. He went to the loading dock where he approached Domenico, and a small group of others. He introduced himself as the attorney for Pickens-Kane and said "I understand you have some issues with Mr. de Vries." Duffee testified that Domenico said that de Vries was attempting to card Pickens-Kane employees "and made some mention about needing to be 705 members and that he and the security folks asked de Vries to get off the dock and he did so." Duffee then walked down off the dock and over to where de Vries and Johnson stood just outside the premises.

Duffee asked de Vries, "what are you doing here." According to Duffee, de Vries said "I had a right to be anywhere I want to be." The two "sparred" and then, Duffee testified,

> "He said, "You got people on this job that can't work here and have to leave." And I said, "Really, who's that?" And he made a motion to the African American gentlemen who handed him a, like a spiral ring folder, opened it up to a page and there were two names on it and he pointed to those two names. . . . One was Rodriguez[, one] was Garcia."

Duffee testified that de Vries pointed to the two names and stated: "They're not 705 people, they can't work here, they have to leave." Duffee asked why, and says that de Vries said that they were "the wrong number," i.e., from a different local union. Duffee says he told de Vries that this was illegal and that de Vries responded that "they had to leave and there was nothing more to be said." Duffee testified that he told de Vries, "if there's a problem, why don't you file a grievance, let's deal with it that way. And he said we already have. And I said, good, then you can just, you, get the hell out of here then if you're going to file a grievance." Duffee testified that de Vries refused and said, "I'm not going anywhere, I have to do what I have to do." Duffee asked de Vries what he meant by that and asked, "are you threatening to picket this job?" De Vries responded:

> "I'm not going to say what I'm going to do, he said I'm just going to stand here and he pointed to the palm of his hand, he says, I'm going to put something in my hand so the members can read it and let them decide for themselves what they want to do."

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[10]As evidenced by Bekken's reception of de Vries on the loading dock, and Drapak's call to Duffee, Pickens-Kane is sensitive to de Vries' presence at worksites. Indeed, as Bekken revealed, de Vries' presence at Pickens-Kane worksites is a subject discussed among management. In short, the record suggests a history of acrimony between de Vries and Pickens-Kane. I note that I resisted efforts of all parties to introduce evidence of various past conflicts, general counsel action (or, more accurately, inaction as it was explained in an offer of proof, see Tr. 160-161) and other excrescence of the parties' relationship. A history of acrimony between labor relations representatives is not unusual. None of the proffered but rejected evidence was offered to show the truthful or untruthful character of any witness. In my view, each party's explication of past labor relations misconduct of the other (none of which involved legal findings of wrongdoing) would not be very useful in assessing witness credibility, but would provide a potentially endless source of competing irrelevant record material. My credibility determinations are made cognizant that there is no love loss between the parties. But indicia of credibility more germane to the testimony about the events in this case provide the basis for my conclusions.

Duffee accused de Vries of threatening to picket:

> "I got a, a little bit agitated and I said, I said, you know, you're threatening to picket my job? I said you listen, I said don't do that, I said we'll come down on you like a ton of bricks. I said, you know, we've been in court on these kinds of things before.
> Q. Did he respond?
> A. He just sort of smiled, he didn't really say much of anything at that point.
> And then he said, you know, you always say things like that. You know, if you've got something to show me, show it to me, you know, put it in my hands, show me what you've got.
> And I said, well, I've got nothing to show you now, I said, but on Monday morning, I said, you know, I suspect we'll have quite a bit to show you. So, you know, that was how I left it with him."

Duffee then introduced himself to Johnson, who was then standing alongside de Vries, but had not said anything. De Vries introduce Johnson as the a new business agent and Duffee quipped to Johnson, "you know, you got to be careful about taking advice from this guy, he's going to get you into trouble."

At that point, their conversation ended with Duffee stepping away to take a phone call from Drapak of Pickens-Kane.

De Vries recalled the conversation with Duffee differently. He testified that Duffee asked what he and Johnson were doing and they responded that they were "observing." Duffee asked why, and de Vries said "because we believe that Pickens-Kane was in violation of their contract." Asked by Duffee for specifics, de Vries referenced Rodriguez and Garcia. De Vries also testified that "[Duffee] asked me if we were going to picket. I told him I wouldn't tell him." De Vries added in the hearing that he said this because he thought this was none of Duffee's business. They "sparred" over Duffee's threats to take the Local to court, and the conversation ended when Duffee got on his cell phone. De Vries denied demanding that Garcia or Rodriguez be removed.

Johnson's recollection of the discussion between de Vries and Duffee was very limited. He testified that "[t]he only thin[g] I remember him basically saying was that, if you don't leave here, you're going to cost your local a lot of money." Johnson's stated that he walked away from the conversation while de Vries and Duffee talked.

I credit Duffee's account of his conversation with de Vries. In the first place his testimonial demeanor was that of someone providing a straightforward recapitulation of events. Moreover, the detail impressed me as a fuller account of the conversation. And it is a plausible account. It is plausible because it explains the decisions that were made after the discussion with de Vries. But more than that, it contains an echo of substantiation in de Vries' own testimony. It is de Vries, after all, who testified that in his conversation with Domenico before Duffee arrived on the scene, that Domenico asked him, "isn't this something that can be resolved by doing a grievance." This reference to the issue of Garcia and Rodriguez's non-member status (see note 9, supra) was Domenico's attempt to head off any kind of direct action or threat of such by de Vries. De Vries' answer, in context, meant that "possibly" he would rely on the grievance machinery to resolve his dispute with Pickens-Kane, but possibly he would take a more confrontational approach. Consistent with this, and even more probative, de Vries testified that when Duffee directly asked him if he was going to picket, de Vries refused to tell

him. In these two instances, described by de Vries in his testimony, it is clear that de Vries quite intentionally wanted to keep the other parties in doubt and concerned over his intentions. The obvious purpose was to induce them to immediately solve the problem de Vries had with nonmembers working. This purpose is consistent with Duffee's account of their conversation. It strains credulity to believe that de Vries left open the possibility he would picket the worksite over Rodriguez and Garcia's presence (as he effectively admits he did), but then never indicated, as asserted by Duffee, that he wanted Garcia and Rodriguez to be excused from the job. I would add that the value of Johnson's testimony that he "didn't hear [de Vries] ask anyone to be removed" is limited by his admission that he "walked away" while de Vries and Duffee were talking.

Duffee spoke with Drapak and then returned to the dock where he spoke with Domenico, and relayed the conversation he had with de Vries. At about 5:15, a Deloitte representative, Warren Frank, came down to the dock accompanied by Neal Banting, also of Deloitte, and Frank's subordinate. Duffee testified that he filled Frank in on what had happened. Banting testified that Frank asked "what does this mean to us." Banting testified that Duffee stated, "well you know, they could potentially strike" which would "delay our job." Banting says that Frank asked if there were alternatives to avoid that and that Duffee responded that "yeah, we could send the [two non-705] guys away, and hopefully the Union representative would go away." Duffee testified that he discouraged this idea, something Banting could not recall, but both agreed that Frank ultimately made the decision that removing the two non-Local 705 Pickens-Kane employees was the best course of action.

Duffee moved immediately to implement Frank's decision, calling Drapak, who arranged with Bekken to remove the two employees. Duffee testified that he saw the employees leave in a Pickens-Kane truck 30-40 minutes later. Bekken estimated it was only 10-15 minutes later that a truck with one replacement worker arrived, at which time Rodriguez and Garcia were taken off the job. A second replacement employee arrived about 45 minutes later. Sometime after Rodriguez and Garcia left, at about 6:30 p.m., Duffee noticed that he hadn't seen de Vries for a while. Duffee walked out to the alley to look for him but did not see him. He called Drapak, and indicated that he thought de Vries was gone. Drapak said that Duffee could leave and he did, at approximately 6:50 to 7:00 p.m. Johnson testified that he and de Vries left at 5:30 or 6:00 p.m., and that from the alley he observed Garcia and Rodriguez continuing to work. De Vries testified that he and Johnson remained in the alley for 40 minutes to an hour after the conversation with Duffee, and that Garcia and Rodriguez were working the whole time.

Consistent with the General Counsel's position that Rodriguez and Garcia were sent home early from work, their time cards and pay stubs for May 20 were introduced into the record (GC Exhs. 5, 6), and showed that they were paid the four hour minimum pay required by the labor agreement on that day. Other records introduced into the record (GC Exh. 4) showed that the remainder of the Pickens-Kane crew worked until 11:00 p.m. that evening.

The testimony is imprecise and somewhat contradictory regarding the timing of the dismissal of Rodriguez and Garcia. I find that Rodriguez and Garcia were still working when de Vries and Johnson left 111 South Wacker, probably around 6:00 p.m., and credit their testimony to that effect. However, I also find (and the testimony is undisputed) that Garcia and Rodriguez were removed from the job. The most reasonable inference is that this happened, in accordance with the testimony and evidence cited above, sometime after de Vries and Johnson left, but before Duffee went to look for de Vries in the alley at around 6:30 p.m.

IV. Analysis and Conclusions

a. 8(b)(2) allegation

Section 8(b)(2) of the Act states, in relevant part, that "[i]t shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause . . . an employer to discriminate against an employee in violation of subsection (a)(3)." Section 8(a)(3) provides, in pertinent part, that "[i]t shall be an unfair labor practice for an employer . . .by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

As the statutory language suggests, to find a violation of section 8(b)(2) it is necessary to prove not only that a union "cause[d] or attempt[ed] to cause" an employer to discriminate, but further, that the employer discrimination sought or caused was the kind cognizable under section 8(a)(3). *NLRB v. Stage Employees IATSE Local 776,* 303 F.2d 513, 519 (9th Cir.) (citing *Radio Officers v.* NLRB, 347 U.S. 17, 53 (1954)), cert. denied 371 U.S. 826 (1962).

While a threat to picket or strike certainly qualifies,[11] there is no requirement that an 8(b)(2) violation involve coercive efforts to "cause" or attempt to cause" the employer to discriminate. A request is sufficient, may be direct or indirect, and evidence of it may be circumstantially inferred from the record. *Laborers Local 1184 (Nicholson Rodio)*, 332 NLRB 1292, 1296 (2000); *M.W. Kellogg Constr.*, 273 NLRB 1049, 1051 (1984), enf. denied on other grounds 806 F.2d 1435 (9th Cir. 1986); *Avon Roofing & Sheet Metal*, 312 NLRB 499 (1993).[12]

In determining whether the employer discrimination the union caused or attempted to cause is discrimination condemned by section 8(a)(3), "it is the 'true purpose' or 'real motive' that constitutes the test." *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961). Where a union has acted to interfere with an employee's employment, the Board presumes an illegal motive that may be rebutted "by evidence of a compelling and overriding character showing that the conduct complained of was referable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or to other matters with which the Act is concerned." *Carpenters Local 1102 (Planet Corp.)*, 144 NLRB 798, 800 (1963).[13]

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[11]See, e.g., *Lake Charles Building and Constr. Trades Council (Rhodes Constr.)*, 173 NLRB 1391 (1968) (threatening to picket to replace non-union employees violates 8(b)(2)); *Sacramento Dist. Council of Carpenters (Gary Denny Constr.)*, 254 NLRB 1037 (1981) (8(b)(2) violation to threaten to shut down job to force replacement of non-union employees).

[12]On the other hand, there must be evidence of a union's effort to have the employer remove an employee. *George Williams Sheet Metal Co.*, 201 NLRB 1050, 1055 (1973) (no violation where union did not endorse employee's removal but simply relayed to employer that other employees would quit if employee was not removed from job). And, "there must be some evidence of union conduct" that attempts to instigate employer action; "it is not sufficient that the employer's conduct might please the union." *Toledo World Terminals, Inc.*, 289 NLRB 670, 673 (1988); *Wenner Ford Tractor Rentals, Inc.*, 315 NLRB 964, 965 (1994).

[13]See, e.g., *NLRB v. Teamsters Local 294*, 317 F.2d 746, 748 (2d Cir. 1963) (no violation where union comments that employee was "a trouble maker" and "no good" were not motivated by employee's union membership or activity); *Philadelphia Typographical Union No. 2 (Triangle Publications),* 189 NLRB 829 (1971) (no violation where union asked employer to discharge employee as undesirable because of conviction for embezzlement, a consideration unrelated to encouragement of union membership).

In this case, based on the findings of fact, above, it is clear that the Union, through de Vries, both on May 13 and May 20, took affirmative action demonstrating that it wanted non-member employees removed from the worksite, for reasons that squarely violate 8(a)(3).

On May 13, de Vries told Donohue that the that "the job should stop" because Pickens-Kane was using non-Union movers. Peoples Energy readily agreed, and immediately used its leverage as a customer to have Pickens-Kane agree to replace the three non-Union crew members. De Vries' demand that "the job should stop" may reasonably be viewed as a threat to use economic force. But, in any event, I find that it reasonably must be viewed as an affirmative attempt to cause the removal of the non-union workers within the meaning of Section 8(b)(2).

It seems possible that, on May 20, had Johnson and de Vries left 111 South Wacker before Duffee arrived—as they were planning to do—there would be no complaint allegation as to these events. However, upon Duffee's arrival, the "sparring" between Duffee and de Vries ratcheted up the confrontation. As the conversation heated up, de Vries reached for the threats—implicit and explicit—that he knew would give Pickens-Kane pause: the threat of a job action that could queer the "prize" contract that Pickens-Kane had landed. While even a polite assertion that nonmember employees "must leave" would have sufficed to violate the Act, the May 20 threat to disrupt work if the nonmembers were not removed clearly constitutes an attempt to cause an employer to discriminate in violation of Section 8(b)(2). *Sacramento District Council of Carpenters*, supra; *Lake Charles Building and Construction Trades* Council, supra.[14]

There remains the question of whether the Union's objective was to have an employer discriminate in violation of section 8(a)(3) of the Act. In this case the question is easily answered. The Union's motive in seeking the removal of Shipman, Badgely, and Cooper on May 13, and of Rodriguez and Garcia on May 20, was because of their nonmembership in Local 705. No other motivation is even vaguely suggested. The Union sought to have the employer discriminate against these employees for the purpose of encouraging union membership, a motive that is prohibited on its face by section 8(a)(3).[15]

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[14]As discussed above, I credit Duffee's version of the conversation, which includes express demands by de Vries that nonmembers be removed. I would add that based solely on de Vries' account of the conversation--his unwillingness to rule out picketing, and the implicit threat to do so contained therein—there is probably an adequate basis to find a violation. But given my findings, there is no need to consider the issue based solely on de Vries' version of events.

[15]There is a statutory exception to the prohibition in 8(b)(2) that permits a union to seek the discharge of nonmembers pursuant to a valid union security clause. However, in order to discharge an employee in accordance with a union security clause there must be compliance with certain Board-required prerequisites. *Food & Commercial Workers Local 368A (Professional Servs.)*, 317 NLRB 352, 354 (1995). Here a valid union security clause existed, and its enforcement was central to the dispute between the parties. But there is no evidence—indeed, no contention--that the Union complied with the mandatory prerequisites to enforcement of a union security clause, which include "a strict fiduciary duty to advise employees of their contractual obligations to maintain membership in good standing before initiating any adverse action against them . . . Among other things, this duty includes the obligations to apprise a dues-delinquent employee of the amount of dues arrearage, the time period in question, and the precise amount of any reinstatement fee that may be required." *Helmsley-Spear, Inc.*, 275 NLRB 262 (1985); *Food & Commercial Workers Local 1445 (Gallahue's Supermarkets*), 247 NLRB 1031, 1032 (1980), enfd. 647 F.2d 214 (1 Cir. 1981); *Iron Workers Local 378 (Judson Steel)*,192 NLRB 1069 (1971) (and cases cited therein), enfd. 80 LRRM (BNA) 2627 (9th Cir.

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In both instances, the Union did not just attempt to cause, but did cause employer discrimination prohibited by section 8(a)(3). On May 13, Donohue readily agreed with the Union that nonmembers Shipman, Badgely, and Cooper, should be removed, but he was acting on the Union's suggestion when he directed Pickens-Kane to remove them from the crew. Pickens-Kane demurred only briefly before removing them, but again, it was an outcome sought and instigated by the Union.[16] The Union's demand received a chillier employer reception on May 20, however, once again, the effort was successful. Shortly after de Vries and Johnson left the area, Rodriguez and Garcia were removed. It was de Vries' conversation with Duffee, in which he declared that the nonmembers "have to leave" that set in motion the discriminatory act of removing the nonmember employees. It is irrelevant that Deloitte and Pickens-Kane could have chosen to ignore de Vries' demand, and, it turned out, de Vries and Johnson would have left anyway. The issue is not whether an employer could have or should have ignored the union's request that it discriminate against employees. The issue is whether a union has caused employees to suffer discrimination prohibited by Section 8(a)(3). By definition, such discrimination is meted out by an employer.[17]

It is notable that on both May 13 and 20, it was not Pickens-Kane, but a customer that made the decision to remove the nonmember employees. Pickens-Kane then agreed to and executed the decision. Indeed, on May 13, the Union's demands were directed exclusively to a secondary employer, Peoples Energy. No one from the Union spoke directly to a Pickens-Kane representative during the incident. Conversely, on May 20, de Vries' demand that the non-members leave was directed only to Pickens-Kane. Deloitte requested the removal of Garcia and Rodriguez based on Duffee's account of his conversation with de Vries. These mediations of the Union's demands do not affect the outcome. In both instances, Pickens-Kane took action to remove the nonmember employees because of their nonmembership in Local 705. In both instances this discriminatory action was instigated, sought, and induced by Local 705.[18]

1972). Even if the Union were correct in its claim that Pickens-Kane violated the union-security clause—something Pickens-Kane denies, and a dispute which I need not wade into--it does not justify the conduct alleged or found. The Union does not contend otherwise.

[16]Cooper, Badgely, and Shipman were removed from the job, but they worked elsewhere on May 13. They appear not to have lost wages as a result of their removal. However, a final determination of what, if any, losses they suffered is an appropriate matter for compliance.

[17]The anomaly of a party filing a charge and advancing a case in which a showing that it violated 8(a)(3) is an element, is not lost on me. However, as far as the record reveals (and to my knowledge) no charge was filed against the Employer relating to the issues raised by this case. There is no question of the Board's authority to proceed solely against the Union. *Radio Officers*, 347 U.S. at 53; *Printing Pressman Local 284* (Las Vegas Sun) 230 NLRB 1104 (1977).

[18]The customers' conduct in this case also amounts to 8(a)(3) discrimination. The Board holds that "[a]n employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affects the working conditions of the latter's employees because of the union activities of said employees." *Dews Constr. Corp.*, 231 NLRB 182, n.4 (1977), enf'd. mem. 578 F.2d 1374 (3d Cir. 1978); *Georgia-Pacific Corp.*, 221 NLRB 982, 986 (1975). In *Dews* and *Georgia-Pacific*, both the employer demanding the discrimination and the employer carrying it out—i.e., the employer of the discriminatees--violated Section 8(a)(3).

I also point out that in this case the Union did not demand that People's Energy or Deloitte cease using Pickens-Kane as their mover. Had it done so, the result of the 8(b)(2) allegation may have been different. This is because the Board holds that an employer does not commit an 8(a)(3) violation by replacing (or threatening to replace) a contractor because of the union or non-union status of the contractor's employees. Such "employer discrimination against

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Finally, the Union asserts that "what this case is really about is Pickens-Kane's attempts to keep de Vries away from their work sites." I cannot agree. This case is about specific conduct that occurred at the worksites on May 13 and 20. As noted, supra, there is no love loss between the parties, and it may be true that Pickens-Kane would prefer to never encounter de Vries at another worksite. (This case will not accomplish that.) But if this case is a cudgel for Pickens-Kane in a long running dispute with the Union, that is not a defense to the conduct alleged. The cudgel was shaped and handed to Pickens-Kane by the Union.

b. 8(b)(1)(A) allegations

It is an unfair labor practice for a labor organization or its agents "to restrain or coerce [ ] employees in the exercise of rights guaranteed in section 7." However, not every 8(b)(2) violation is also a violation of 8(b)(1)(A). *Plumbers Local 669 (Lexington Fire)*, 318 NLRB 347, n.4 (1995) ("It is well established that other 8(b)violations do not give rise to derivative violations of Sec. 8(b)(1)(A)"); *National Maritime Union*, 78 NLRB 971 (1948), enfd.175 F.2d 686 (2d Cir. 1949), cert. denied 338 U.S. 954 (1950).

Here, the Respondent did not just attempt to cause, but did cause discrimination against employees. The effects of this discrimination, caused by the Union, necessarily served to "restrain or coerce [ ] employees in the exercise of rights guaranteed in section 7" and therefore the Union's conduct violates Section 8(b)(1)(A) of the Act. See, *Radio Officers,* 347 U.S. at 42 ("the union by requesting such discrimination, and the employer by submitting to such an illegal request, deprived [the employee] of the right guaranteed by the Act to join in or abstain from union activities without thereby affecting his job").

V. Conclusions of Law

1. Charging Party Pickens-Kane Moving and Storage Co. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Local 705, IBT is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Sections 8(b)(1)(A) and (2) of the Act by:

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employer" is not a violation of 8(a)(3), and therefore, "union pressure merely designed to achieve such an end would not violate Section 8(b)(2)." *Plumbers Local 447 (Malbaff Landscape)*, 172 NLRB 128 (1968). Indeed, in *Malbaff* the Board stated that when such a demand is made on a secondary employer by a union, "we do not regard the fact that [the primary employer] might discharge its nonunion employees, replace them with union men, and thereby bring itself into favor with the union as supplying the discrimination element essential to an 8(b)(2) finding." *Malbaff*, supra at 130. While I would be hard pressed to draw a distinction between an employer demand that a contractor remove non-union employees (which is an 8(a)(3) violation), and an employer threat to cease doing business with a contractor because of the presence of non-union employees that results in the removal of the non-union employees by the contractor (not an 8(a)(3)), the Board has drawn such a distinction. See, discussion in *Computer Associates*, 324 NLRB 285 (1997), enfd. 282 F.3d 849 (D.C. Cir. 2002). Clearly, the instant case falls within the ambit of *Dews*, and not *Malbaff*. The Union sought and caused 8(a)(3) discrimination and therefore is liable under 8(b)(2).

a. attempting to cause and causing the Employer on May 13, 2005 to remove employees Lee Badgely, Joe Cooper, and Lenny Shipman from the worksite at the Prudential Building, 130 East Randolph, Chicago, Illinois, because of their nonmembership in Local 705.

b. attempting to cause and causing the Employer on May 20, 2005, to remove employees Richard Rodriguez and Roland Garcia from the worksite at 113 South Wacker Drive, Chicago, Illinois, because of their nonmembership in Local 705.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6), and (7) of the Act.

VI. The Remedy

Having found that the respondent Local 705, IBT has violated Section 8(b)(1)(A) and 8(b)(2) of the Act, I shall order it to cease and desist therefrom and from in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also order Respondent to take certain affirmative action designed to effectuate the policies of the Act. I have found that Local 705 unlawfully caused Pickens-Kane Moving and Storage Co. to discriminate against Roland Garcia, Richard Rodriguez, Lenny Shipman, Joe Cooper, and Lee Badgely. Respondent shall make these employees whole for any loss of earnings suffered as a result of the discrimination caused by the Respondent. Backpay shall be computed in accordance with the Board's decision in *F.W. Woolworth Co.*, 90 NLRB 298 (1950) with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent shall be required to post an appropriate notice, attached hereto as "Appendix." [19]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Local 705, IBT, its officers, agents, and representatives, shall

1. Cease and desist

(a) From causing and attempting to cause Pickens-Kane to remove employees from a worksite for being nonmembers of Local 705.

[19]The evidence does not call for a reinstatement remedy and I have not included one. I note that neither the General Counsel nor the Charging Party request a reinstatement remedy, which is in keeping with the complete lack of record evidence that any of the discriminatees remain out of work. Indeed, as noted supra at note 16, the discrimination appears not to have caused Badgely, Cooper, or Shipman to have lost any work, and the evidence shows only that Garcia and Rodriguez lost work on May 20.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Make employees Lee Badgely, Joe Cooper, and Lenny Shipman, whole for any loss of earnings and other benefits, less any net interim earnings, plus interest, resulting from Charging Party's removal of them from the worksite at 130 Randolph Street on May 13, 2005, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1172 (1987).

(b) Make employees Richard Rodriguez and Roland Garcia whole for any loss of earnings and other benefits, less any net interim earnings, plus interest, resulting from Charging Party's removal of them from the worksite at 113 South Wacker Drive, on May 20, 2005, with interest as computed in New Horizons for the Retarded, 283 NLRB 1172 (1987).

(c) Within 14 days from the date of this Order, post at the Respondent's union hall copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and be maintained by Respondent for 60 days consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material. Moreover, signed copies of the notice shall be sent by the Regional Director to the Employer for posting at the Employer's place of business, if the Employer elects to do so.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 13, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provisions of the foregoing paragraph.

Dated, Washington, D.C., December 23, 2005.

_____

David I. Goldman
Administrative Law Judge

JD–94-05
Chicago, IL

APPENDIX

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT cause or attempt to cause Pickens-Kane to remove employees from a worksite because they are nonmembers of Local 705.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL make employees Lee Badgely, Joe Cooper, and Lenny Shipman whole for any loss of earnings and other benefits resulting from their removal from the worksite at 130 Randolph Street on May 13, 2005, less any net interim earnings, plus interest.

WE WILL make employees Richard Rodriguez and Roland Garcia whole for any loss of earnings and other benefits resulting from their removal from the worksite at 113 South Wacker Drive on May 20, less any net interim earnings, plus interest.

TEAMSTERS LOCAL 705 AFFILIATED W/ IBT
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

209 South LaSalle Street, 9th Floor Chicago, Illinois 60604

Hours: 8:30 a.m. to 5 p.m.

312-353-7570.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 312-353-7170.